(15)

No. 05-11304

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Where a defendant has failed to object to jury instructions at trial, does the State lose its right to a plain-error type of review on remand because the state appellate court initially but erroneously held there was no error?

2. Is a state procedural ground "adequate" when the state's procedural law provides both fair notice of the procedure to preserve claims and a reasonable opportunity to do so, but the rule and its exceptions continue to evolve through case law.

3. Is Texas's *Almanza* rule an adequate and independent state ground of decision in this case?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Texas Court of Criminal Appeals applied a heightened standard of review to a claim of error in a jury instruction to which defendant did not object at trial. This is standard practice in most jurisdictions. A claim that such

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

review is precluded merely because, in its initial consideration of the case, the appellate court erroneously concluded there was no error at all would create a loophole for defaulted claims, lead to needless reversals for minor errors on close questions, and reward sandbagging in the trial court. Such a rule is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Sixteen years ago, defendant LaRoyce Smith and his accomplices robbed a Taco Bell in Dallas, Texas where he had previously worked. The shift manager, Jennifer Soto, let him in after hours to use the telephone. Smith repaid her kindness by putting her in a headlock, pistol-whipping her, and then shooting her in the back. J. A. 135-136. He then threatened the other employee present, Travis Brown, with death if he called the police. Brown testified to these events at trial. J. A. 136.

The trial came after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*). Defendant moved to declare the Texas statute unconstitutional. J. A. 7-16. The trial court proposed an additional mitigation instruction to fix the *Penry* problem and expressly invited defense counsel to suggest any improvements. J. A. 21. Counsel did not. On direct appeal, the Texas Court of Criminal Appeals (CCA) found that the instruction given complied with *Penry I*. J. A. 145-147.

Smith's first state habeas application was dismissed as untimely, but, after the Legislature amended the governing statute, he filed a second petition. See *Ex parte Smith*, 132 S. W. 3d 407, 410 (Tex. Crim. App. 2004). The CCA found that the instruction was distinguishable from the one held insufficient in *Penry* v. *Johnson*, 532 U. S. 782 (2001) (*Penry II*), and denied the claim on the merits. See 132 S. W. 3d, at 410-411. This Court summarily reversed in a *per curiam* opinion, finding the instruction not distinguishable from *Penry*

II, and "remanded for further proceedings not inconsistent with this opinion." *Smith* v. *Texas*, 543 U. S. 37, 48-49 (2004).

On remand, the CCA applied the rule of *Almanza* v. *State*, 686 S. W. 2d 157 (1984) (op. on reh'g), the Texas standard of review for objections to jury instructions not raised at trial, and held that *Smith* had not carried his burden of showing "egregious harm," as *Almanza* requires for "unobjected-to-jury-charge error." *Ex parte Smith*, 185 S. W. 3d 455, 457 (Tex. Crim. App. 2006). This Court granted certiorari on Nov. 13, 2006.

SUMMARY OF ARGUMENT

Texas's *Almanza* rule is similar in purpose and operation to Federal Rule of Criminal Procedure 52. It does not prevent all review of unobjected-to errors but instead requires a greater showing of harm by the defendant. The Texas court's invocation of this standard after reversal of its initial decision that there was no error was proper and is the same as the course of action this Court directed in the wake of *United States* v. *Booker*.

The *Almanza* rule is independent of federal law to the extent it assesses degree of harm after the federal question has been decided or assumed in the defendant's favor. However, if this Court should decide that the CCA erred against defendant regarding which items of mitigation were outside the scope of the special issues, the correct course under *Three Affiliated Tribes* is to clarify the federal predicate and remand for redetermination of the state question.

The law regarding "adequate" state grounds is a tangle of confusion. *Amicus* submits that the Court should adopt a rule along the lines suggested by Professor Wright that fair warning of the requirement and a reasonable opportunity to comply are all that is required.

The Texas court's application of a long-established rule to the circumstances of this case was not an unjustified or unpredictable break with prior law, and defendant had ample opportunity to voice any objection to the instruction before it was given.

ARGUMENT

I. Where a defendant has failed to object at trial, the state does not lose its right to review under a "plain error" type of standard merely because the state court initially held there was no error.

Much of the dispute in this case involves how to characterize the Texas rule of *Almanza* v. *State*, 686 S. W. 2d 157 (Tex. Crim. App. 1984) (op. on reh'g). Is it a harmless error rule or a procedural default rule? See, *e.g.*, Brief for Petitioner 44-45. Supplemental Brief in Opposition 2, 7. *Amicus* CJLF submits that the two parts of the *Almanza* rule are closely analogous to the two subdivisions of Federal Rule of Criminal Procedure 52, "Harmless and Plain Error." Far from being an evasion of this Court's mandate reminiscent of the darkest days of the civil rights struggle, see Brief for John J. Gibbons, et al., as *Amici Curiae* 12-13, and n. 6, the Texas court's application of the second part of *Almanza* on remand is substantially the same as the course of action this Court indicated was proper in *United States* v. *Booker*, 543 U. S. 220, 268 (2005).

A. Plain Error.

When a criminal defendant timely objects to a federal constitutional violation, the standards for harmless error are set by this Court's precedents in state and federal courts alike. If the error is "structural" there is no harmless error analysis, see *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991), but very few errors are. See *Johnson* v. *United States*, 520 U. S. 461, 468-469 (1997). For all others, the error requires reversal unless the prosecution shows it was harmless beyond a reasonable doubt.

See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). Not only does Texas not dispute this, it has gone so far as to codify the *Chapman* standard. See Tex. Rule App. Proc. 44.2(a).

In federal courts, nonconstitutional errors to which the defendant did object at trial are reviewed for harmlessness under a more lenient standard. See *United States* v. *Olano*, 507 U. S. 725, 734-735 (1993) (discussing Rule 52(a)). The same is true in Texas courts. See *Almanza*, 686 S. W. 2d, at 171. This is the "some harm" standard.

For constitutional errors not objected to, the federal courts do not and the state courts need not apply the *Chapman* standard. The federal standard under Rule 52(b) and *Olano* is quite difficult for the defendant.

> "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' 507 U. S., at 732. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Johnson* v. *United States*, 520 U. S. 461, 466-467 (1997) (internal quotation marks omitted in part).

Applying the *Olano* rule, the very first question is whether there was error at all. See *id.*, at 467. Unlike the situation on federal habeas corpus, where procedural default is normally addressed before the merits, see *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997), the *Olano* structure calls for the merits to be addressed first. If a court were to decide there was no error, there would be no point in discussing the remaining criteria for relief. See, *infra*, at 7.

B. The Booker Remands.

Unlike *Chapman*, which is a constitutional rule, this Court views the plain error rule as being within legislative control. Rule 52(b) is binding, and courts have no authority to make

exceptions. See *Johnson*, 520 U. S., at 466. If there is no *Chapman*-like constitutional mandate that overrides federal rules, then there is no constitutional mandate that overrides state rules and statutes, as construed by the state courts. A state could refuse to consider unpreserved claims of error under any standard, and a few do. See 5 W. LaFave, J. Israel, N. King, Criminal Procedure § 27.5(d), p. 926, n. 98 (2d ed. 1999). With no review at all constitutionally required, the standard chosen by states for making an exception is a matter of state law.

Petitioner contends that the CCA's initial decision that there was no error precludes its use of the "egregious harm" standard on remand. See Brief for Petitioner 41-44. *Amicus* Constitution Project contends that the CCA "sidestep[ped] this Court's ruling by imposing [a] new state-law procedural barrier[] on remand . . . ." Brief for the Constitution Project as *Amicus Curiae* 21 ("CP Brief"). At the petition stage, a group of former federal judges similarly accused the CCA of "thwart-[ing] compliance with this Court's decision." Brief for John J. Gibbons, et al., as *Amici Curiae* 8.

For perspective, it is useful to examine what this Court said the federal courts of appeals should do and what they actually did in the wake of *Booker*, *supra*. For two decades after the enactment of the Sentencing Reform Act of 1984, the Federal Sentencing Guidelines were mandatory. Attacks on them based on *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), were routinely rejected until *Blakely* v. *Washington*, 542 U. S. 296 (2004). See *United States* v. *Penaranda*, 375 F. 3d 238, 243, n. 5 (CA2 2004) (collecting cases). Between the *Blakely* earthquake and the *Booker* aftershock, the circuits were divided, and some continued to uphold the Guidelines as mandatory. See *United States* v. *Argento*, 371 F. Supp. 2d 1167, 1169 (CD Cal. 2005) (collecting cases). This created a situation where many defendants who were tried before *Blakely* did not make a Sixth Amendment objection at trial and where

many courts of appeals in the interim period did not believe there was any error.

The *Booker* opinion itself indicates what should happen in these cases. "Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." 543 U. S., at 268. This is dictum, but the courts of appeals have followed it.

United States v. *Dock*, 426 F. 3d 269 (CA5 2005), followed an appellate trajectory nearly identical to the present case. On his initial appeal, Dock raised a *Blakely* objection to the Sentencing Guidelines, which the Court of Appeals summarily rejected on the merits based on circuit precedent. See *id.*, at 271. This Court granted, vacated, and "remanded for further consideration in light of . . . *Booker* . . . ." *Dock* v. *United States*, 545 U. S. 1112 (2005). On remand, the Court of Appeals applied the plain error standard due to the lack of an objection at sentencing. See 426 F. 3d, at 272. The court denied relief because Dock could not carry his burden under that standard. See *ibid.*

United States v. *Fox*, 429 F. 3d 316 (CA1 2005), presents a variation on the theme. In the initial appeal, the First Circuit stated the *Olano* test but did not go past the first prong—there was no error. *United States* v. *Fox*, 393 F. 3d 52, 62-63 (CA1 2004). After this Court's "GVR," see *Fox* v. *United States*, 545 U. S. 1125 (2005), the Court of Appeals found that Fox could not clear the third hurdle of *Olano*, a reasonable probability of a lesser sentence. See 429 F. 3d, at 318.

These two cases differ only in form, not in substance. Should Dock have received a new sentencing hearing and Fox not received one because one court found no *Blakely* error as a ruling on the merits and the other court found no *Blakely* error as the first prong of *Olano*? That would elevate form over substance and result in arbitrary dispensation of relief.

Yet that is the implication of petitioner's argument that once a court rejects a claim on the merits it cannot apply the plain-error rule after a vacate-and-remand. There are many other examples of federal courts of appeals in multiple circuits applying the plain-error rule after a *Booker* remand, although they are unpublished. See, *e.g.*, *United States* v. *Gonzalez*, 188 Fed. Appx. 547 (CA8 2006); *United States* v. *Lizarraga-Orduno*, 150 Fed. Appx. 792, 798-800 (CA10 2005); *United States* v. *Edmonds*, 2006 U. S. App. LEXIS 21419, No. 04-12971 (CA11, Aug. 22, 2006). In searching through the *Booker* remand cases, *amicus* has not found a single one where the applicability of plain-error review depended on whether the Court of Appeals had invoked that rule on the first appeal.[2]

C. The Almanza Rule.

Given that the federal *Olano* rule is not precluded by an initial but vacated affirmance on the merits, we turn to the question of whether the Texas *Almanza* rule should be any different. In 1985, the Texas Court of Criminal Appeals en banc[3] undertook to clear up a confused area of the law. The standard of review for errors in the jury charge was governed by an opaque statute and irreconcilable case law. See 686 S. W. 2d, at 161. The court extracted the correct meaning of the statute via a thorough historical review of statutes and precedents. See *id.*, at 161-171.

Six years before Smith's trial, the state court gave this definitive construction of the Texas statute.

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2. We estimate that there are approximately 800 *Booker* GVR cases and do not claim to have read all of the opinions on remand, but we have searched for a case drawing this distinction and not found one.

3. In the South Western Reporter, the 1984 panel opinion and the 1985 opinion on rehearing en banc are published together. The en banc opinion, authored by the panel dissenter, begins on page 160.

"Article 36.19 actually separately contains the standards for *both* fundamental error and ordinary reversible error. If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is 'calculated to injure the rights of defendant,' which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.

"On the other hand, if no proper objection was made at trial and the accused must claim that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.' " *Id.*, at 171.

As so construed, the Texas law parallels Rule 52. The first part is the harmless error rule for preserved, nonconstitutional errors. The second part sets the bar considerably higher for defendants who fail to object in the trial court, and it applies to constitutional as well as nonconstitutional claims. See *Jimenez* v. *State*, 32 S. W. 3d 233, 235-239 (Tex. Crim. App. 2000).

Returning to our original question, is this second part a harmless error rule or a procedural default rule? See *supra*, at 4. Like Rule 52(b) as construed in *Olano*, it is both. Like the third and fourth prongs of *Olano*, it is based on an assessment of the actual harm to the defendant, which makes it a kind of harmless error analysis. Yet, like Rule 52(b), this higher burden is only imposed as a result of the defendant's default, *i.e.*, his failure to object to the charge in time to prevent the error. Cf. *Williams* v. *Taylor*, 529 U. S. 420, 432 (2000) (additional burdens of 28 U. S. C. § 2254(e)(2) triggered only by fault of defendant).

The State notes that "the lack of an objection to jury charge error, generally speaking, does not forfeit the error on appeal in Texas; it merely requires a more onerous showing of harm for

reversal." Supp. Brief in Opp. 7. True, but the fact that the claim is not completely barred by the *Almanza* rule does not mean that *Almanza* is not a default rule as that term is used in the jurisprudence of this Court's jurisdiction and of federal habeas corpus. *Almanza* holds that failure to object when required forfeits the relatively lenient harmless-error review that would otherwise apply (either *Chapman* or "some harm") and substitutes the more stringent standard of "fundamental" or "egregious harm."[4] In the federal system, "Rule 52(b) defines a single category of forfeited-but-reversible errors," *Olano*, 507 U. S., at 732, and *Almanza* operates in the same way. See *Jimenez*, 32 S. W. 3d, at 238 (referring to rights being "forfeitable" in applying *Almanza*).

The CCA's application of the *Almanza* rule on remand in this case was neither an act of defiance nor an evasion of this Court's mandate. Both the rule itself and its application to this case are well within the mainstream of American jurisprudence. The threshold question for this case, then, is whether and to what extent the state court's decision stands on an independent and adequate state ground.

II. A heightened standard of review for claims not made at trial is an independent state ground when it operates to deny relief based on an assessment of the degree of harm to the defendant.

On direct review of state court decisions, this Court's jurisdiction is not precluded by a state ground of decision unless that ground is "independent of federal law." *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985). In *Ake*, the state's exception to its waiver rule for fundamental errors included all

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4. The Texas court has noted that verbal formulations in this area are necessarily imprecise, and that variations in wording often matter little. *Almanza*, 686 S. W. 2d, at 172; cf. *Strickland* v. *Washington*, 466 U. S. 668, 696-697 (1984); *Chapman*, 386 U. S., at 24.

federal constitutional errors as "fundamental." See *id.*, at 74-75. "Thus, the State has made application of the procedural bar depend on an antecedent ruling of federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.*, at 75.

State rules such as the one in *Ake* are a vanishing breed because federal constitutional restrictions on state criminal procedure long ago expanded beyond the fundamental. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). In *Stewart* v. *Smith*, 536 U. S. 856, 858 (2002) (*per curiam*), the Court considered an Arizona successive petition rule with differing standards for claims of "sufficient constitutional magnitude." On a certified question, the Arizona Supreme Court clarified that this referred only to the category of claim, not an evaluation of the merits. See *id.*, at 859. Under this rule, "[c]ourts need not decide the merits of the claim, *i.e.*, whether the right was actually violated." *Id.*, at 859-860. If a determination that a defaulted claim does not meet the state's criteria for an exception to the default rule can be made independently of deciding whether there was federal constitutional error at all, the rule is independent.[5]

For a few claims, the harmfulness of what happened is an element of the constitutional claim. For example, if exculpatory evidence is not material, there is no constitutional obligation to disclose it, and therefore there is no such thing as a nonprejudicial *Brady*[6] error. See *Strickler* v. *Greene*, 527 U. S. 263, 281-282 (1999). Putting these claims to one side, the assessment of the harm caused by the procedure that the defendant objects to is generally a separate question from whether the procedure was correct. Jury instructions generally

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5. *Stewart* noted, but did not decide, the still-unresolved question of whether the independence requirement applies to federal habeas at all. See *id.*, at 860.

6. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

do not depend for their correctness on any assessment of the harm they cause the defendant.

A harmless-error analysis is usually preceded by a determination that there was an error. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, n. 2 (1993). In most criminal appeals, this would be a determination in the defendant's favor. However, the state court's harmless error analysis could have a federal predicate unfavorable to the defendant in determining the scope of the error that needs to be assessed for harm. In the case of a *Penry* claim, some evidence may be within the scope of the special issues and some may not. Drawing that line is a federal question, and a difficult one. In the "fog of confusion that is [this Court's] annually improvised Eighth Amendment 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751(1992) (Scalia, J., dissenting), the Texas special issue system is an exceptionally dense patch. For example, *Penry* v. *Johnson*, 532 U. S. 782, 797 (2001) (*Penry II*) curiously quotes the *dissent* in an earlier case for a proposition *rejected* by the opinion of the Court in that case. Cf. *Johnson* v. *Texas*, 509 U. S. 350, 373 (1993). Such language leaves judges in both state and federal courts in Texas scratching their heads.

If a state court were to find that some items are within the scope of the special issues and the *remaining* items were insufficiently mitigating to be harmful under an independent state rule, the latter determination would nonetheless depend on the former. This Court has jurisdiction to review the federal predicate to the state question, and, if error is found, to vacate and "remand the case so that the [state] court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U. S. 138, 152 (1984).

The CCA's opinion in the present case is less than clear regarding which items of mitigating evidence it thought were within the reach of the sentencer through the special issues and which were outside the scope but not sufficiently substantial

that their exclusion fell short of the "egregious harm" threshold. The CCA declared itself uncertain on this point, an uncertainty that is entirely understandable given both the inconsistency of this Court's Texas special issues cases generally and its puzzling summary *per curiam* opinion in the present case.

This Court's summary disposition makes this reference to the cognizability of the mitigating evidence under the special issues: "And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Smith* v. *Texas*, 543 U. S. 37, 48 (2004) (*Smith I*). On its face, this statement could be read to imply that *none* of the mitigation evidence was within the special issues, but it could not possibly mean that without a serious disregard for precedent.

In the present case, the defendant's primary mitigating circumstance was his youth at the time of the crime. That is the only circumstance mentioned in his pretrial attack on the special issues. See J. A. 8-9. As to this circumstance, there unquestionably was no *Penry* error. *Johnson*, 509 U. S., at 368, is binding precedent squarely on point. "We believe there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." This holding cannot be overruled without making a "new rule." See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, pp. 5-7. *Tennard* v. *Dretke*, 542 U. S. 274 (2004), and *Penry II*, 532 U. S., at 782, are both habeas cases, where new rules cannot be made absent exceptions not applicable here. *Smith I* is a summary disposition, something normally done only on established law, again with exceptions not applicable here. See *Lambrix* v. *Singletary*, 520 U. S. 518, 538-539 (1997). None of these cases purports to overrule *Johnson*, and none was decided in a posture where reconsidering a precedent was in order. *Johnson*, therefore, is

still good law. See also *Ayers* v. *Belmontes*, 549 U. S. __ (No. 05-493, Nov. 13, 2006) (slip op., at 8) (citing *Johnson*).

Smith I lists four items of mitigating evidence in addition to age: (1) diagnosis with a learning disability; (2) low score on an IQ test and placement in special education; (3) good behavior in school; and (4) having a father who was a drug addict and stole from the family. Evidence of good behavior is certainly important, but it is just as certainly within the scope of future dangerousness or lack of it. Indeed, *Kelly* v. *South Carolina*, 534 U. S. 246, 254 (2002) held that, realistically, evidence of past violent behavior is so clearly related to future violence as to trigger the parole eligibility disclosure requirement of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). It follows logically that evidence of good behavior is relevant and accessible to the sentencer under the dangerousness special issue.

The CCA "assume[d], for the sake of argument, that at least some of applicant's evidence was not fully encompassed by the two special issues." 185 S. W. 3d, at 467. With this Court's precedents squarely on point for age and logically controlling for good behavior, the worst case scenario is that the early diagnosis, the IQ test and special education, and the addicted, thieving father were possibly outside the jury's reach. These items fall far short of the compelling mitigation needed to reach a threshold of "egregious harm" or "fundamental error" under the "entire record" of this case. See *id.*, at 468. The defendant himself factually disproved the low IQ factor by taking the stand and demonstrating his mental capacity directly to the jury, holding his own against a professional prosecutor on cross-examination. See *id.*, at 469. The placement in special education was apparently not the consequence of permanent or organic disability, as defendant caught up to his grade level and was returned to regular classes. See *id.*, at 460. Defendant's father will not win any awards for Father of the Year, but this evidence is a far cry from the kind of abuse that has been

presented in other cases. See *e.g.*, *Rompilla* v. *Beard*, 545 U. S. 374, 391-392 (2005).

In summary, the items of mitigation that are even arguably outside the scope of the special issues are factually weak, only mildly mitigating, or both. A court could find them to be harmless error even under the *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) standard.[7] Whether they fall beneath the Texas threshold of "egregious harm" is an independent question of state law for the state court to decide. If the uncertainty of the state court opinion is deemed to bring the question within this Court's jurisdiction, and if this Court believes the CCA has erred on the federal question, the proper course is to decide which items of mitigating evidence were outside the effective reach of the sentencer and remand for redetermination of the state question with that federal predicate clarified. See *Three Affiliated Tribes*, 467 U. S., at 152.

III. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds and the prior patchwork of confusing phrases discarded.

Amicus Constitution Project contends that the *Almanza* rule is not an "adequate" state ground. CP Brief 16-18. This contention provides the Court with an opportunity to clear up some long-standing confusion. This Court's precedents on adequate state grounds span the entire twentieth century, and they form a haphazard patchwork, offering "[v]arying [r]ub-

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7. The fact that consideration of such evidence is considered a federal constitutional question illustrates once again the weakness of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and its progeny. See *id.*, at 622-624 (White, J., concurring in the judgment); *Walton* v. *Arizona*, 497 U. S. 639, 661-673 (1990) (Scalia, J., concurring in part and in the judgment), overruled on other grounds in *Ring* v. *Arizona*, 536 U. S. 584, 589 (2002); *Graham* v. *Collins*, 506 U. S. 461, 478-500 (1993) (Thomas, J., concurring). Reconsidering *Lockett* is not the question presented in this case, but it should be reconsidered in the near future.

rics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading

making the appearance clearly stated the objection. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.*, at 24.

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 16. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*. *Barr* v. *City of Columbia*, 378 U. S., at 149-150, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S., at 301, quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955) but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the

particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383. The "strictly" requirement in *Barr* was a bolt from the blue, and one that can cause perverse results if taken literally, creating a disincentive for states to vest their courts with needed discretion. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, pp. 385-386 (2d ed. 1996).

Bennett v. *Mueller*, 322 F. 3d 573 (CA9 2003), illustrates how the *Barr* rule spawns pointless litigation and punishes flexible state relief limits. California, like most jurisdictions, has a requirement that state habeas petitions be timely filed, a rule well established before Bennett's 1986 guilty plea. See *In re Stankewitz*, 40 Cal. 3d 391, 396, n. 1, 708 P. 2d 1260 (1985). Yet Bennett filed his state habeas petition almost thirteen years after the judgment and six years after the state supreme court had further clarified the timeliness rule. See 322 F. 3d, at 579. A clearly established rule, ample opportunity to comply, and a clear violation of the rule were not enough to make the state rule "adequate" in the Ninth Circuit. The case had to be remanded to the District Court to launch an investigation of the state courts to determine if they had been sufficiently strict in applying the rule. See *id.*, at 583. California could avoid this kind of inquisition by replacing its relatively flexible timeliness rule with a rigid statute of limitations, as Congress did in enacting 28 U. S. C. § 2244(d). It is difficult to see what federal interest is served by encouraging such a change or by squandering scarce judicial resources in these kinds of investigations.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234; Wright, Miller, & Cooper, *supra*, at 385-386. Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, the opinion implies that it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim. The leading commentator on federal procedure has proposed a similar test. See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[8]

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8. If trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000).

The test *amicus* proposes is consistent with the policy of respecting the right of the states to regulate procedure in their own courts, see *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991), while also protecting "the federal interests in protecting federal rights against bad procedure." See Wright, Miller, & Cooper, *supra*, § 4021, at 302. The proposed test is also consistent with the results, if not the language, of all this Court's "adequate state ground" cases except the notorious *Henry* v. *Mississippi*, 379 U. S. 443 (1965). As Justice Kennedy has explained, that case was simply wrongly decided and should be overruled. See *Lee* v. *Kemna*, 534 U. S. 362, 393-395 (2002) (dissenting opinion). Space does not permit a thorough discussion of these points, but they are discussed in our brief in *Lee*. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 10-19, http://www.cjlf.org/pdf/Lee.pdf.

IV. State cases which deny defaulted claims on the merits should not be deemed failures to enforce the rule.

The federal judge *amici* cite a number of cases *denying Penry* claims without discussion of the *Almanza* rule as evidence that its invocation in this case "is novel and aberrational." Brief for John J. Gibbon, et al., as *Amici Curiae* 10. Under the test proposed by Professor Wright and colleagues and urged in Part III of this brief, these cases would be irrelevant. A rule clearly stated in a statute or the rules of court and frequently enforced provides fair notice of its existence, even if it is not "strictly" enforced.

Even if the "strictly or regularly followed" test survives, however, there is an important distinction which has so far been overlooked. There is a major difference between skipping past a defaulted issue to *deny* a claim on the merits and excusing a default to *grant* a claim on the merits.

Much of the "inadequate state ground" jurisprudence has its roots in the suspicion of discrimination against disfavored

claims or parties. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, p. 384 (2d ed. 1996). In order to have a disfavored group, there must be a favored group. A court which skips past a default issue to deny the claim on the merits has not done the party much of a favor. Such a decision does open the door to federal review on the merits, but relief was a remote possibility even before enactment of the present subdivision (d) of 28 U. S. C. § 2254 in 1996. See V. Flango, Habeas Corpus in State and Federal Courts 61 (National Center for State Courts 1994) (1609 denied in sample of 1626). It is even more remote since. See *Williams* v. *Taylor*, 529 U. S. 362, 410-411 (2000). Most claimants who are denied relief by state courts will not obtain it from federal courts either, regardless of whether the denial is on procedural grounds or on the merits. Therefore, denying a claimant relief on one ground rather than another is not the kind of discrimination that implicates the federal interests involved here. Cf. *Williams* v. *Georgia*, 349 U. S. 375, 384-387 (1955) (noting similar cases in which relief was granted).

When the responding party contends that a claim is both meritless and defaulted, a court may have sound reasons for denying it on the merits rather than deciding the default issue. When the moving party must clear multiple hurdles to obtain relief, there is generally no requirement to decide the issues in any particular order. Once it is clear that the moving party cannot clear one hurdle, there is usually no hard-and-fast requirement to decide any of the others. For example, *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) expressly endorsed the practice of denying ineffective assistance claims for lack of prejudice without deciding whether counsel's performance was deficient, whenever that is the easier route to decision.

Federal courts recognize an exception to the rule stated above for jurisdiction. Because the legitimacy of the decision of other issues depends on it, jurisdiction must be decided first. *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83,

94-95 (1998). Procedural default issues can claim this priority when they are jurisdictional, such as direct review in this Court of state-court decisions. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). When the default is not jurisdictional, the order of decision becomes discretionary.

Lambrix v. *Singletary*, 520 U. S. 518 (1997), addressed the order of consideration of procedural default issues. In federal habeas cases, these issues should ordinarily be decided before retroactivity and the merits, but not invariably. *Id.*, at 525. "Judicial economy might counsel giving the *Teague*[9] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Ibid.* The *Lambrix* Court then proceeded to resolve the case on the basis of *Teague*, without answering the default question. *Ibid.*

There is no basis in reason or policy why a state rule should be branded as "inadequate" merely because the state courts occasionally take the same path that this Court took in *Lambrix* and that Congress authorized for unexhausted claims in 28 U. S. C. § 2254(b)(2). Judicial economy in the state appellate courts is no small concern. Once it becomes obvious that an appellant cannot clear one of several hurdles in the path to relief, it would be a pointless waste of a scarce resource to decide whether he can clear the others.

Jimmy Swaggart Ministries v. *Board of Equalization of Cal.*, 493 U. S. 378 (1990), illustrates that dismissal of a meritless, defaulted claim on the merits does not render a state rule "inadequate." Swaggart challenged the taxation of religious materials before the Board of Equalization on First Amendment grounds. *Id.*, at 382-384. The Board's rejection of the First Amendment claim was affirmed on the merits by the state court and this Court. *Id.*, at 384, 397. In the state court, Swaggart also raised a claim under the Commerce

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9. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion).

Clause and a claim under the Ninth and Tenth Amendments, even though neither had been raised before the Board. See *Jimmy Swaggart Ministries* v. *State Bd. of Equalization*, 204 Cal. App. 3d 1269, 1290, 1292, n. 19, 250 Cal. Rptr. 891, 905, 907, n. 19 (1988). The state court denied the Commerce Clause claim as procedurally defaulted, *id.*, at 1292, 250 Cal. Rptr., at 906-907, and the Ninth/Tenth Amendment claim on the merits. *Id.*, at 1293, 250 Cal. Rptr., at 907-908.

On appeal, this Court rejected Swaggart's contention that California's procedural rule was "not 'strictly or regularly followed.' " 493 U. S., at 398-399. The rule was "adequate" even though "the Court of Appeal in this case . . . ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments [citation] even though those arguments were likewise not raised" in the administrative proceedings. *Ibid.* The apparent reason the state court went to the merits of the latter arguments is that they were "singularly unpersuasive," 204 Cal. App. 3d, at 1293, 250 Cal. Rptr., at 907, and thus decision on the merits was more efficient than pondering the exceptions to California's administrative exhaustion rule. This Court in *Swaggart* brushed off the argument that the state court's choice had somehow rendered the rule inadequate, stating only that "appellant has failed to substantiate any claim that the California courts apply this exception in *an irregular, arbitrary, or inconsistent manner*." 493 U. S., at 399 (emphasis added).

Swaggart thus tells us that "strictly or regularly followed" means not "irregular, arbitrary, or inconsistent." It further tells us that dismissing a meritless defaulted claim on the merits rather than on the default is not irregular, arbitrary, or inconsistent. A party claiming that a state rule is "inadequate" due to less-than-strict enforcement should have to show, at a minimum, that substantial numbers of other litigants are unfairly favored by having their claims reviewed *and granted* despite an indistinguishable procedural default.

V. Defendant had fair notice of the rule and an opportunity to comply, and the rule was fairly applied to his case.

Petitioner complains that his is the first case in which the rule of *Almanza* v. *State*, 686 S. W. 2d 157 (1984) (op. on reh'g) "has ever been applied to a *Penry* claim on state habeas." Brief for Petitioner 47, n. 16. In the common law method of rulemaking, someone's case has to be the first. Whether a case is the first in some narrowly, and arguably artificially, defined category is not the test. The test should be "that in attempting to assert a federal right litigants are neither surprised by the creation of novel procedural doctrines, nor confounded by procedures so complex that ordinarily competent attorneys cannot secure determination of that right." 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387 (2d ed. 1996).

The due process cases are instructive here. Fair warning does not require a case squarely on point. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997). Even for the substantive definition of crimes, it is only "unjustified and unpredictable breaks with prior law" that "violate[] the principle of fair warning." See *Rogers* v. *Tennessee*, 532 U. S. 451, 462 (2001). The present case does not involve a change in substantive criminal law or even a change to the law of trial procedure. Every competent lawyer knows you must object to the jury charge before it is given or risk losing the claim. The only change here is the circumstances under which an objection will be considered despite the default.

On its face, the *Almanza* standard applies to defaulted objections to the jury charge. See 686 S. W. 2d, at 171. Application of the standard to *Penry* claims was an entirely foreseeable development. Nor should any defendant expect a *more* favorable standard on habeas corpus than he receives on direct appeal. That would be backwards, for reasons recognized long before Smith's trial. See *Davis* v. *United States*, 411 U. S. 233, 240-241 (1973).

Petitioner objects to the application of *Almanza* to his constitutional claim, citing *Ladd* v. *State*, 3 S. W. 3d 547, 564 (Tex. Crim. App. 1999), for the proposition *Almanza* does not apply. Brief for Petitioner 47, n. 16. This is an odd objection. In *Ladd*, the appellant *requested* review of his defaulted claims under *Almanza*, and the CCA refused to give him any review *at all*. By reviewing under *Almanza* instead of declaring a complete forfeiture of the claim, the CCA has made a change in petitioner's favor. Instead of applying a rule with greater severity than before, cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), the CCA has mitigated the severity. Reviewing for "egregious harm" in lieu of no review at all hardly constitutes setting "springes." Cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (Holmes, J.).

Amicus Constitution Project indicts the CCA for the crime of granting relief in several cases, despite lack of an objection at trial, in the wake of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*). CP Brief 18-19. All of these cases were tried before *Penry I* and are therefore distinguishable. Federal habeas law recognizes an exception for novel claims, *Reed* v. *Ross*, 468 U. S. 1, 14-15 (1984), and so does Texas. See *Black* v. *State*, 816 S. W. 2d 350, 368-370 (Tex. Crim. App. 1991) (Campbell, J., concurring) (citing *Reed*); *Ramirez* v. *State*, 815 S. W. 2d 636, 655 (Tex. Crim. App. 1991) (following *Black* concurrence). On federal habeas, a novelty exception for *Penry I* claims is precluded by *Penry I*'s own dubious holding that it was not a new rule. See *Selvage* v. *Collins*, 975 F. 2d 131, 135-136 (CA5 1992). Texas procedure is under attack here for being more generous to defendants than federal law.

While the CCA made a novelty exception to the contemporaneous objection rule for *Penry I*, it did not for *Penry II*, which was a much less dramatic change. The cases *amicus* Constitution Project cites are inapposite. See CP Brief 17-18. In both *Ex parte Davis*, No. WR-40,399-6 (Tex. Crim. App., Mar. 29. 2006), and *Ex parte Robinson*, No. AP-74,720 (Tex. Crim. App., Mar. 16, 2005), the CCA held that the petitioner met the

criterion to file a successive petition and remanded to the trial court for further proceedings. Neither order states that the *Almanza* rule will be inapplicable when the merits are considered. Contemporaneous objection at trial and successive petitions are different rules and need not be governed by the same standards. Indeed, on federal habeas the two were only the same for a fairly brief period from *McCleskey* v. *Zant*, 499 U. S. 467 (1991), until the Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U. S. C. § 2244(b). No principle of federal law is offended if the Texas courts take a stricter view of what is novel enough to avoid the *Almanza* standard than they do of what is novel enough to warrant a successive habeas petition.

The only remaining question is whether this case involves an "exorbitant application of a generally sound rule," *Lee* v. *Kemna*, 534 U. S. 362, 376 (2002), or, using our proposed standard from Part III, *supra*, whether the rule was applied in a way that the defendant lacked fair notice it applied or a reasonable opportunity to comply.

To the extent they are relevant here, defendant's two pretrial motions, J. A. 7-10; J. A. 11-16, assert that he has mitigation evidence outside the scope of the special issues, based on the federal law of *Penry I*, and that the trial court lacked the power to correct the deficiency. The latter contention was purely one of state law. See Brief for Petitioner 48, and n. 17. In denying the motions and proposing a curative instruction, the trial court effectively rejected the state law premise. Regarding whether the curative instruction was sufficient to fix the *Penry I* problem, the trial judge expressly invited defense counsel to make known any objections.

> "THE COURT: If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

"MR. MANASCO: Thank you." J. A. 21.

This case is the diametric opposite of *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990). In *Osborne*, the judge had already rejected an argument that lewdness was an element of the offense, and objecting to a jury instruction for the omission of that element would have been pointless. See *ibid.* In this case, the trial judge genuinely believed he had fixed the *Penry* problem, the only dispute being whether he had the authority to do so under state law. He expressly invited defense counsel to suggest further improvements to the fix, and counsel made none. For a defendant to make on appeal or habeas the exact objection invited but not made at trial is a prime example of a defaulted claim.

As to defendant's age and record of behavior, there simply was no federal constitutional error. To the extent that the jury charge did not provide a vehicle for consideration of defendant's other mitigating evidence, the CCA was justified in applying the *Almanza* standard, and that rule is an adequate and independent state ground of decision.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be affirmed.

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Respectfully submitted,

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